

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
RICHARD ACCARDO	:	DETERMINATION
	:	DTA NO. 809079
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Periods Ended	:	
November 30, 1985, May 31, 1986 and August 31,	:	
1986.	:	

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Petitioner, Richard Accardo, 165 Barnes Road, Washingtonville, New York 10992, filed a petition for revision of a determination or for a refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ended November 30, 1985, May 31, 1986 and August 31, 1986.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on July 18, 1991 at 10:45 A.M. Petitioner submitted his brief on December 13, 1991. The Division of Taxation did not file a brief. Petitioner appeared by McGuirk, Levinson, Zeccola, Seaman, Reineke & Ornstein, P.C. (J. Tad Seaman, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel).

ISSUE

Whether petitioner filed a timely request for a conciliation conference.

FINDINGS OF FACT

The Division of Taxation ("Division") issued to petitioner, Richard Accardo, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Assessment No. S870915709L), dated September 15, 1987, in the amount of \$52,804.85, plus penalty of \$10,562.32 and interest of \$6,039.13, for a total amount due of \$69,406.30. The notice of determination contained the following explanation:

"You are liable individually and as officer of Rudolph's Suburban Center, Inc. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Law."

On September 27, 1988, a warrant was filed by the Tax Compliance Division of the Division of Taxation in the office of the clerk of Orange County (relative to Assessment No. S870915709L) for additional tax due of \$52,804.85, plus penalty and interest, for a total amount due of \$80,342.71. The warrant listed petitioner's correct address (165 Barnes Road, Washingtonville, New York), but contained the zip code "10914" when, in fact, the correct zip code was "10992" (the correct zip code was set forth on the notice of determination).

Apparently, in October or November 1988, a collection agent visited petitioner's home to advise him of the existence of the warrant and to seek payment of the amounts due and owing.

On November 6, 1990, petitioner filed a Request for Conciliation Conference. The envelope containing the request was postmarked November 7, 1990, and was stamped received by the Bureau of Conciliation and Mediation Services on November 13, 1990. The Bureau of Conciliation and Mediation Services thereafter issued a Conciliation Order, dated December 21, 1990, which dismissed petitioner's request for a conciliation conference for the following reason:

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on September 15, 1987, but the request was not mailed until November 7, 1990, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied."

On January 7, 1991, petitioner filed a petition with the Division of Tax Appeals seeking administrative review of the Bureau of Conciliation and Mediation Services' denial of his request for a conciliation conference.

To establish proof of mailing of the aforesaid notice of determination, the Division of Taxation submitted the following:

(a) An affidavit dated July 9, 1991, of Michael O'Reilly, a supervisor of clerks in the Tax Compliance Division ("TCD"), the content of which included:

(1) A statement of his supervisory duties and familiarity with TCD

procedures for the mailing of notices of determination;

(2) A copy of the notice of determination issued to petitioner which was prepared by a clerk under his supervision and which was then transferred to the Division's outgoing mail record of notices mailed;

(3) An outline of the TCD's procedures (paragraphs "6" through "11" of the affidavit) including his assertion that the Division does not request the United States Postal Service to obtain a certified mailing receipt from the recipients of the notices;

(4) A statement that the certified mailing of the notice of determination to petitioner was in compliance with TCD procedures and, in addition, that he was unaware of any problems that arose with respect to the issuance of this notice of determination.

(b) A one-page United States Postal Service form (PS Form 3877) containing the following information:

(1) The name and address of the sender was "Tax Compliance, State Campus, 9-17-87". There is writing below which is illegible;

(2) On line 9 is the number 539965 (presumably the certified mailing number) along with petitioner's name and correct mailing address;

(3) The type of mail (there are five types listed) appears to be blank although there are marks near the box labeled "certified";

(4) The remaining lines for addressees are blank (Mr. O'Reilly's affidavit indicated that this was done for confidentiality);

(5) The column for postages/fees, on the line pertaining to petitioner, contains illegible writing;

(6) On the bottom of the form there are two boxes, one labeled "Listed by Sender" and the other "Received at Post Office". Both boxes contain the number "15";

(7) Also at the bottom of the form is a signature, presumably that of a Postal Service employee;

(8) The form also contains a United States postmark (Albany, N.Y. - Roessleville) of September 17, 1987.

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioner contends there is no way he could have responded timely to the notice because he never received it, nor did he receive notice from the post office that there was a certified letter for him. The first time petitioner became aware of the notice was approximately one year (October or November 1988) after the notice was issued when the Division sent a collection representative to petitioner's residence who advised him of the warrant and requested payment. Petitioner states that he immediately went, with his attorney, to the Division's Ryebrook office to ascertain why a warrant had been filed. He did not petition for a conciliation conference or a hearing because he knew nothing of his protest rights. He was later (approximately two years later or 1990) referred by his personal accountant to Stewart Buxbaum C.P.A. who, on behalf of petitioner, filed a request for a conciliation conference on November 7, 1990.

Furthermore, petitioner maintains that the Division failed to prove it ever mailed the notice because according to the Postal Regulations, the Division did not correctly fill out the mailing log. The space provided on the mailing log for fees should have been filled in but was left blank. Therefore, it is possible that the mail was returned to the Tax Compliance office because there was no postage affixed. Because of this error, petitioner believes the mailing record is incomplete and is insufficient to prove mailing.

Petitioner also states that both the notice and the warrant list the same address but the warrant contains a different zip code which is incorrect. Because petitioner believes the mailing record itself is incomplete and, therefore, deficient, there is no way to determine whether the notice was mailed to the correct address. Lastly, petitioner claims that the Division should have mailed the notice by certified mail, return receipt requested, in order to prove mailing.

The Division contends that the affidavit and mailing record together prove the notice

was mailed on September 17, 1987; therefore, petitioner failed to timely file, and the request for conference was correctly denied.

### CONCLUSIONS OF LAW

A. Tax Law § 1147(a)(1) provides:

"A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this Article by the giving of notice shall commence to run from the date of mailing of such notice."

B. The taxpayer has 90 days from the mailing of the notice to apply to the Division of Tax Appeals for a hearing (Tax Law § 1138[a][1]).

C. A conciliation conference shall be provided, at the option of any taxpayer, where the taxpayer has received a written notice of a determination of tax due (Tax Law § 170[3-a][a]). The 90-day time period for filing a petition is suspended if the taxpayer files a request for a conciliation conference under Tax Law § 170(3-a)(b). The request must be filed within 90 days of the date of mailing of the notice of determination (20 NYCRR 4000.3[c]).

D. Where the division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division is required to establish when it mailed the notice of determination (Matter of Novar T.V. & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991, citing, Matter of Magazine v. Commissioner, 89 TC 321; Southern California Loan Assn. v. Commissioner, 4 BTA 223, 224-225). In order to prove mailing, the Division must establish a standard procedure for the issuance of such notices by one with knowledge of such procedures, and must also introduce evidence to show that the procedure was followed in the particular case at hand (see, Matter of Katz, Tax Appeals Tribunal, November 14, 1991; see also, Matter of Novar T.V. & Air Conditioner Sales & Serv., supra; Cataldo v. Commissioner, 60 TC 522, 524).

E. An affidavit of a Division employee, along with a copy of the mailing log, explaining the general mailing procedures, identifying the certified mailing record and describing how this mailing record evidenced that the notices in question were, in fact, issued to petitioner is

sufficient proof of mailing (see, Matter of Katz, supra; Matter of Rosen, Tax Appeals Tribunal, July 19, 1990).

The Division has introduced adequate proof of its general mailing procedures by way of an affidavit of Mr. Michael O'Reilly, Supervisor of the Tax Compliance Division of the Division of Taxation. Mr. O'Reilly generally described the Division's mailing procedures for issuing notices of determination and notes that the Division does not, in the ordinary course of business, request return receipts from certified mail. In addition, the affidavit identifies the attached copy of the notice of determination issued to petitioner and identifies the attached mail log.

F. In order to satisfy the second portion of the Division's burden, namely that the Division's general issuance procedures were, in fact, followed, the Division can submit an adequate certified mail record (Matter of Katz, supra). A one-page mail record containing petitioner's name and address, and a postmark as well as indicating that the Post Office received the same number of documents as are listed on the record, is sufficient evidence to establish that the Division's procedures were followed (see, Matter of James S. Clark, Jr. and Joice M. Clark, Tax Appeals Tribunal, June 18, 1992; Matter of Katz, supra; Matter of Novar T.V. & Air Conditioner Sales & Serv., supra).

G. In the present matter, the U.S. Postal Service form set forth petitioner's correct name and address, indicated that 15 items were sent by the sender (Tax Compliance) and 15 items were received by the Post Office. In addition, the postmark of September 17, 1987 was contained on the same page as the information pertaining to petitioner.<sup>1</sup>

It having been established that the notice of determination was properly issued by the Division on September 17, 1987, petitioner, in order to be entitled to a conciliation conference, must have filed a request therefor within 90 days of September 17, 1987. The postmark on the

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<sup>1</sup>The postmark on the mail record is dated September 17, 1987, but the notice and the conciliation order refer to the date of issuance as September 15, 1987. It should be noted that regardless of which date is used to determine the date of mailing, petitioner's request was still mailed in excess of the 90-day period.

envelope containing the request for conference was November 7, 1990 (see, Finding of Fact "3"), clearly more than 90 days after issuance of the notice of determination.

Even assuming, arguendo, that petitioner did not receive the notice of determination in September 1987, he admittedly was notified of the existence of the assessment in October or November 1988 when he was personally visited by a collection agent of the Division. Although he took some steps to inquire, no petition for an administrative hearing or request for a conciliation conference was filed until November 7, 1990. While it may be true that he was not aware of the petition requirements to challenge an assessment, he apparently (see, Paragraph "6") was being counseled by both an attorney and an accountant at various stages. These professionals should have known or, at the very least, could have ascertained that the provisions of the Tax Law required the filing of a petition or request within 90 days after issuance of the statutory notice. The waiting for an additional two years, after allegedly being notified of the assessment for the first time,

to file the request for a conciliation conference must, therefore, weigh heavily against petitioner and the credibility of his testimony.

H. The petition of Richard Accardo is dismissed.

DATED: Troy, New York  
August 6, 1992

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE